Tirai Kristal Sdn Bhd v Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–497–11 OF 2012
ABDUL WAHAB, LIM YEE LAN AND UMI KALTHUM JJCA
30 NOVEMBER 2017

Land Law — Sale of land — Sale and purchase agreement — Parties entered into sale and purchase agreement after land search of property — Application to enter private caveat over property unsuccessful — Plaintiff commenced action against defendant's office claiming compensation — Whether plaintiff conducted private land search under s 384 or official search within meaning of s 385 of the National Land Code — Whether defendant owed duty of care to plaintiff — Whether there was failure to exercise reasonable and proper check on status of property prior to entering sale and purchase agreement — Whether plaintiff exercised due diligence — Whether plaintiff took necessary proactive measures to mitigate losses when failing to lodge caveat — Whether plaintiff entitled to claim compensation for losses suffered

Kunjung Raya Development Sdn Bhd ('Kunjung Raya') made a representation to the plaintiff that they were the registered proprietor of a property ('property') and made an offer to the plaintiff to sell the property. Prior to entering into a sale and purchase agreement, the plaintiff conducted a land search of the property at the defendant's office. The land registry issued a document which stated, amongst others, that Kunjung Raya was the registered owner of the property and that the property was a freehold land, free from any encumbrances. The plaintiff and Kunjung Raya entered into a sale and purchase agreement and the plaintiff paid a total amount of RM555,418.75, which was equivalent to ten percent of the purchase price. The plaintiff applied to enter a private caveat over the property at the land registry but it was unsuccessful. The plaintiff was then informed by the defendant that the private caveat could not be lodged over the property because the property had in fact yet to be alienated. The plaintiff terminated the sale and purchase agreement and sought refund of the deposit from Kunjung Raya but to no avail. Thus, in an attempt to recover their losses, the plaintiff commenced an action against the defendant and claimed for, inter alia, judgment in the sum of RM555,418.75 or alternatively compensation under s 386 of the National Land Code ('the NLC'). The High Court, dismissed the plaintiff's claim. Hence, the plaintiff appealed against the said decision.

Held, dismissing appeal:

(1) The crux of the plaintiff's claim was premised upon s 384 of the NLC, that is, the private land search. Thus, having founded a cause of action under s 384 of the NLC, the plaintiff could not now limit the scope of submission of the defendant and the extent of deliberations made by the JC solely on s 384 to the exclusion of other related relevant provisions within that particular part of the same legislation. Moreover, the plaintiff had prayed alternatively for compensation under s 386 of the NLC. The plaintiff could not now find fault with the finding of the JC for delving into this issue. The JC was correct to scrutinise and reflect the whole of Part Twenty-Seven entitled 'Searches' of the NLC to determine the question of duty of care. The plaintiff's suggestion to narrow down the scope of their appeal specifically within the confines of s 384 read together with s 386 of the NLC would entail the provision to be read in isolation and out of context and which would in turn result in a miscarriage of justice (see paras 18–19).

(2) The JC was correct in distinguishing land search made under s 384 as against ss 385 and 386 of the NLC for compensation in relation to any loss suffered by the purchaser. The JC in determining whether there was a duty of care owed by the defendant to the plaintiff made a clear finding that any information retrieved under s 384 of the NLC was merely on the basis to assist the members of the public to obtain information in relation to land whenever they were required to do so. This was merely an exercise of extracting the required information from the defendant's data base without any confirmation of the information so extracted. The defendant did not owe a duty of care to the plaintiff under s 384 and was therefore not negligent. The plaintiff was not entitled to claim any compensation for the losses suffered under s 386 of the NLC when the very information the plaintiff had relied upon was retrieved via a private search under s 384 (see paras 21–22 & 24).

(3) The plaintiff had chosen to rely only on the private land search conducted via their solicitors to enter into the sale and purchase agreement with Kunjung Raya for the purchase of the property. The plaintiff had not acted with prudence and had not exercised reasonable care and caution with regards to this land transaction. The plaintiff had been hasty in proceeding with this transaction as records showed that all the transaction was done within a period of a month. There was no evidence to suggest that the plaintiff had made any attempt to prevent their banker's cheques from being cashed out once the plaintiff failed to lodge a private caveat over the property (see paras 25 & 27–28).

(4) The plaintiff should have exercised their due diligence carefully and taken necessary proactive measures to prevent and/or mitigate their losses when they failed to lodge the said caveat a week after the signing of the agreement. The fact that the plaintiff had failed to lodge the private

caveat should have been perceived as a red flag that something was amiss and yet there was no evidence of any immediate action taken by the plaintiff to stop this transaction (see paras 28–29).

[Bahasa Malaysia summary

Kunjung Raya Development Sdn Bhd ('Kunjung Raya') membuat representasi kepada plaintif bahawa mereka adalah pemilik berdaftar hartanah ('hartanah') dan membuat tawaran kepada plaintif untuk menjual hartanah itu. Sebelum memasuki perjanjian jual beli, plaintif menjalankan carian hartanah di pejabat defendan. Pendaftaran tanah mengeluarkan dokumen menyatakan, antara lain, bahawa Kunjung Raya adalah pemilik berdaftar hartanah itu dan hartanah adalah tanah pegangan bebas, bebas daripada apa-apa kekangan. Plaintif dan Kunjung Raya memasuki satu perjanjian jual beli dan plaintif membayar jumlah RM555,418.75 bersamaan dengan 10% harga pembelian. Plaintif memohon untuk mendaftarkan kaveat persendirian atas hartanah di Pendaftaran tanah tetapi gagal berbuat demikian. Plaintif kemudiannya dimaklumkan oleh defendan bahawa kaveat persendirian tidak boleh didaftarkan atas hartanah itu kerana hartanah belum diberi milik. Plaintif membatalkan perjanjian jual beli dan menuntut mendapatkan bayaran balik deposit daripada Kunjung Raya tetapi tidak berjaya. Oleh itu, dalam percubaan mendapatkan balik kerugian yang dialaminya, plaintif memulakan guaman terhadap defendan dan menuntut, antara lain, penghakiman dalam jumlah RM555,418.75 atau secara alternatif pampasan di bawah s 386 Kanun Tanah Negara ('KTN'). Mahkamah Tinggi menolak tuntutan plaintif. Oleh itu, plaintif merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan:

(1) Inti pati tuntutan plaintif berlandaskan s 384 KTN, iaitu, carian tanah persendirian. Oleh itu, setelah mengasaskan kausa tindakan di bawah s 384 KTN, plaintif tidak boleh sekarang mengehadkan skop hujahan defendan dan sejauh mana perbincangan dibuat oleh PK hanya atas s 384 dengan tidak termasuk peruntukan relevan lain dalam bahagian tertentu undang-undang yang sama. Tambahan lagi, plaintif telah menuntut secara alternatif untuk pampasan di bawah s 386 KTN. Plaintif tidak boleh sekarang mencari kesalahan dapatan PK kerana menyelidiki isu itu. PK betul apabila meneliti dan mencerminkan keseluruhan Bahagian Dua Puluh Tujuh bertajuk 'Searches' bawah KTN bagi menentukan persoalan tanggungjawab berjaga-jaga. Cadangan plaintif untuk mengecilkan skop rayuannya secara khususnya dalam lingkungan s 384 dibaca bersama dengan s 386 akan melibatkan peruntukan dibaca secara berasingan dan luar konteks dan akan mengakibatkan ketidakadilan (lihat perenggan 18–19).

(2) PK betul dalam membezakan carian tanah yang dibuat bawah ss 384 dan 385, serta s 386 KTN untuk pampasan berhubungan apa-apa kerugian

yang dialami pembeli. PK dalam menentukan sama ada tanggungjawab berjaga-jaga harus diberikan oleh defendan kepada plaintif membuat dapatan yang jelas bahawa apa-apa maklumat yang diambil bawah s 384 KTN semata-mata atas dasar membantu orang ramai memperoleh maklumat berhubungan dengan tanah apabila mereka dikehendaki berbuat demikian. Ini hanyalah cara mengekstrak maklumat yang diperlukan daripada pangkalan data defendan tanpa apa-apa pengesahan berkenaan maklumat yang diekstrak. Defendan tidak mempunyai kewajipan berjaga-jaga kepada plaintif bawah s 384 dan dengan itu tidak cuai. Plaintif tidak berhak menuntut apa-apa pampasan untuk kerugian yang dialami bawah s 386 KTN apabila maklumat yang plaintif gunakan telah diambil melalui carian persendirian bawah s 384 (lihat perenggan 21–22 & 24).

(3) Plaintif memilih untuk bergantung hanya pada carian tanah persendirian yang dijalankan melalui peguamnya untuk memasuki perjanjian jual beli dengan Kunjung Raya bagi pembelian hartanah. Plaintif tidak bertindak dengan bijak dan tidak melaksanakan penjagaan berhati-hati dan munasabah berhubungan transaksi tanah ini. Plaintif telah terburu-buru dalam meneruskan dengan transaksi kerana rekod menunjukkan segala transaksi dibuat dalam tempoh satu bulan. Tiada keterangan untuk menunjukkan bahawa plaintif membuat cubaan melarang penunaian cek bank sebaik sahaja plaintif gagal mendaftarkan kaveat persendirian atas hartanah (lihat perenggan 25 & 27–28).

(4) Plaintif sepatutnya menjalankan usaha wajar dengan berhati-hati dan mengambil langkah-langkah yang perlu bagi melarang dan/atau mengurangkan kerugian mereka apabila mereka gagal mendaftarkan kaveat tersebut seminggu selepas menandatangani perjanjian. Fakta bahawa plaintif gagal mendaftarkan kaveat persendirian sepatutnya dilihat sebagai satu amaran bahawa ada sesuatu yang tidak kena tetapi tiada bukti bahawa apa-apa tindakan segera diambil oleh plaintif untuk menghentikan transaksi ini (lihat perenggan 28–29).]

Notes

For a case on sale and purchase agreements, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 5426.

Legislation referred to

Companies Act 1965
National Land Code ss 22, 384, 385, 385(2), 386

Appeal from: Civil Suit No S2–21–210 of 2008 (High Court, Kuala Lumpur)

Winston PC Ng (John TC Foo with him) (Winston Ng & Teoh) for the appellant.

Narkunavathy Sundareson (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] This was an appeal by the appellant/plaintiff against the decision of the learned judicial commissioner (as she then was) ('JC') in dismissing the appellant's/plaintiff's claim with costs after a full trial.

[2] The appellant/plaintiff is a company incorporated in Malaysia under the Companies Act 1965.

[3] The respondent/defendant is the Director of Lands and Mines of the Federal Territory of Kuala Lumpur.

[4] For the purpose of this appeal, the parties will be referred to as the plaintiff and the defendant as they were in the High Court.

BRIEF FACTS OF THE CASE

[5] Kunjung Raya Development Sdn Bhd ('Kunjung Raya') had made a representation to the plaintiff that they were the registered proprietor of a property held under the description of Lot 44680 Mukim Batu, in the district of Kuala Lumpur, in the Federal Territory bearing postal address Lot 9/62, Taman Menjalara, Off Jalan Taman Bukit Maluri, Kepong 52100 Kuala Lumpur ('property'). Kunjung Raya made an offer to the plaintiff to sell the property at RM5,554,177.50.

[6] On 7 June 2007, prior to entering into a sale and purchase agreement with Kunjung Raya, the plaintiff had instructed their solicitors to conduct a land search of the property at the defendant's office.

[7] Upon payment of the prescribed fee, the land registry issued a document entitled 'Catatan Carian Persendirian' (P5) which stated, amongst others, that Kunjung Raya was the registered owner of the property and that the property was a freehold land, free from any encumbrances.

[8] The plaintiff paid RM111,083 to Kunjung Raya's solicitors as earnest deposit on 11 June 2007 and subsequently entered into a sale and purchase agreement with Kunjung Raya (P16) on 22 June 2007 to purchase the property. On execution of the agreement, the plaintiff paid a further sum of

RM444,335.75 to Kunjung Raya vide two banker's cheques (P15) dated 20 June 2007.

[9] The total amount paid by the plaintiff to Kunjung Raya was RM555,418.75 which is the equivalent to 10% of the purchase price of RM5,554,177.50 (we noted there was extra payment of RM1 in the computation). The payment was made by way of banker's cheques.

[10] On 29 June 2007, the plaintiff's solicitors applied to enter a private caveat over the property at the land registry but it was unsuccessful. The plaintiff's solicitors were subsequently informed by the defendant by way of a letter dated 26 November 2007 (P9) that the private caveat could not be lodged over the property because the property has in fact yet to be alienated.

[11] The plaintiff terminated the sale and purchase agreement and sought refund of the deposit from Kunjung Raya but to no avail.

[12] The plaintiff then initiated civil proceedings against Kunjung Raya in August 2008. Kunjung Raya failed to enter appearance and a judgment in default was entered against Kunjung Raya on 3 November 2008. The plaintiff failed to recover any of the deposit paid to Kunjung Raya as the said company was a shell company.

[13] Thus, in an attempt to recover their losses, the plaintiff commenced an action against the defendant and claimed for the following reliefs:

(a) judgment in the sum of RM555,418.75 or alternatively compensation under s 386 of the National Land Code ('the NLC');

(b) interest thereon at 8% from 22 July 2007 up to the date of settlement;

(c) general and/or exemplary damages; and

(d) costs.

DECISION OF THE HIGH COURT

[14] The learned JC dismissed the plaintiff's claim with costs of RM5,000 based on the following reasons:

(a) the land search made by the plaintiff was not an official search within the meaning of s 385 of the NLC but a private search under s 384 of the same. Therefore, the defendant did not owe any duty of care to the plaintiff;

A (b) the plaintiff had failed to exercise reasonable and proper check on the status of the property prior to entering into the sale and purchase agreement with Kunjung Jaya despite the high value of the transaction; and

B (c) the plaintiff had failed to tender any evidence to show that attempts had been made by the plaintiff to stop and/or to mitigate the losses by ensuring the payments made via banker's cheques issued in the month of June 2007 were blocked or stopped.

C THE APPEAL

[15] The plaintiff's appeal was premised on the following grounds:

(a) the learned JC had taken into consideration matters that were not pleaded in the defendant's statement of defence and were not raised during the trial in establishing that there was no duty of care owed by the defendant to the plaintiff; and

D

(b) the plaintiff had acted with prudence and had exercised reasonable care and caution in the sale and purchase agreement with Kunjung Jaya when they relied on the information gathered from the land search made at the defendant's office.

E

DECISION OF THE COURT

F *The learned JC had taken into consideration matters that were not pleaded in the defendant's statement of defence and were not raised during the trial in establishing that there was no duty of care owed by the defendant to the plaintiff*

G **[16]** The plaintiff's main contention was that the finding made by the learned JC, that the land search conducted by the plaintiff was not an official search within the meaning of s 385 of the NLC but that it was a private search under , was not pleaded by the defendant in the first place. The learned JC had also distinguished the search made under s 384 and search made under s 385 of the NLC which led the learned JC in making a specific finding that there was no duty of care owed by the defendant to the plaintiff for search made under s 384 of the NLC.

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I **[17]** The plaintiff alleged that this issue only surfaced in the defendant's written submission after the trial had been concluded. As parties are bound by their pleadings, the learned JC had misdirected herself and had erred in law when she relied on these contentions.

[18] After perusing the plaintiff's claim, we were of the view that the crux of the plaintiff's claim was premised upon s 384 of the NLC, that is, the private land search. The plaintiff's land search was in P5, entitled 'Catatan Carian Persendirian', where below that title it was stated as follows:

> Adalah diperakui bahawa suatu *carian persendirian* telah dibuat mengikut *Seksyen 384*, Kanun Tanah Negara berkenaan tanah berikut: (Emphasis added.)

Thus, having founded a cause of action under s 384 of the NLC, the appellant could not now limit the scope of submission of the defendant and the extent of deliberations made by the learned JC solely on s 384 to the exclusion of other related relevant provisions within that particular part of the same legislation. Moreover, in prayer 15 a of the statement of claim, the plaintiff had prayed alternatively for compensation under s 386 of the NLC.

[19] We were of the view that the plaintiff could not now find fault with the finding of the learned JC for delving into this issue. The learned JC was correct to scrutinise and reflect on the whole of Part Twenty-Seven entitled 'Searches' of the NLC to determine the question of the duty of care. What the plaintiff suggested was to narrow down the scope of their appeal specifically within the confines of s 384 read together with s 386 of the NLC. To do that would entail the provision to be read in isolation and out of context and which would in turn result in a miscarriage of justice.

[20] We also observed that the consideration made by the learned JC in relation to Part Twenty-Seven of the NLC was within the context of the issue whether there was a duty of care owed by the defendant to the plaintiff. In any event, the defendant had pleaded in para 9 of the statement of defence as follows:

> 9. Seterusnya Defendan menyatakan bahawa tindakan yang dibawa oleh Plaintif melalui guaman ini adalah suatu salahtanggapan (misconceived) kerana bertentangan dengan peruntukan Kanun Tanah Negara 1965.

To us, para 9 was sufficiently wide enough to incorporate the raising of the defence of s 385 of the NLC without so many words stated seeing that the plaintiff's claim was based on s 384 and therefore it was misconceived in the circumstances. In fact, the plaintiff failed to state in the statement of claim that they made the private search under s 384 of the NLC.

[21] We agreed with the approach taken by the learned JC in distinguishing land search made under s 384 as against s 385, and s 386 for compensation in relation to any loss suffered by the purchaser. These three relevant sections, which comprise Part Twenty-Seven, are reproduced below:

384 Private searches

Any person or body may, at any time during normal office hours of any Registry or Land Office, but subject to payment of the prescribed fee and such other conditions (if any) as may be prescribed, inspect and take notes of or extracts from —

(a) any register of title, Presentation Book or Correction Notebook maintained by the Registrar or any predecessor in office; and

(b) any instrument of dealing or application presented or made to, or in the custody of, the Registrar.

385 Official searches

(1) Any person or body may apply to the Registrar for an official search in respect of any land.

(2) Any such application shall be accompanied by the prescribed fee, and the Registrar shall, as soon as may be after the receipt thereof, *issue to the applicant a certificate of search under his hand and seal* —

(a) specifying the person or body for the time being registered as proprietor of the land and, if he is registered as such as trustee or as representative, indicating that face;

(b) summarising, so far as they relate to matters which are still effective, all memorials and other entries on the register document of title thereto;

(ba) specifying the express conditions and restrictions in interest to which the land is subject;

(c) indicating whether, at the time of issue of the certificate (which shall be precisely stated therein) —

(i) any instrument of dealing has been presented for registration on the register document of title to the land;

(ii) any application for the endorsement or entry of any matter on that document has been made under Chapter 7 of Part Eighteen, Chapter 1 of Part Nineteen, Chapter 2 of Part Twenty-one or Part Twenty-two; and

(iii) a copy of any prohibitory or other order relating to the land or any share or interest therein has been presented to or served on the Registrar pursuant to the provisions of this Act or any other written law for the time being in force.

386 Compensation

Any purchaser of any alienated land, or any share or interest therein, who suffers any loss or damage by reason of any error in, or omission from, any *certificate of search* shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of section 434. (Emphasis added.

[22] The learned JC in determining whether there was a duty of care owed by the defendant to the plaintiff made a clear finding that any information

retrieved under s 384 of the NLC was merely on the basis to assist the members of the public to obtain information in relation to land whenever they were required to do so. This was merely an exercise of extracting the required information from the defendant's data base without any confirmation of the information so extracted.

[23] On the contrary, on the plain reading of s 385 of the NLC, it provides for a further active step which needs to be taken by the defendant after an official search has been conducted, that is, by issuing to the applicant a certificate of search under his hand and seal certifying to the accuracy of the information contained therein.

[24] Section 385 of the NLC is the provision that places the defendant in a position of accountability over land search made thereof as reflected in s 386. The defendant would only owe a duty of care to the plaintiff had the land search been made pursuant to s 385 and not under s 384 of the NLC. In other words, the defendant did not owe a duty of care to the plaintiff under s 384 and was therefore not negligent. It followed that the plaintiff was not entitled to claim any compensation for the losses suffered under s 386 of the NLC when the very information the plaintiff had relied upon was retrieved vide a private search under s 384. The words 'certificate of search' appearing in s 386 can only refer to the words 'certificate of search' appearing in sub-s 385(2), whereas no such words appear in s 384. Our interpretation of s 385 read together with s 386, being express provisions, provide for the exception to the provisions of s 22 of the NLC which provides for the protection of officers appointed under Part Two of the NLC as follows:

> 22 Protection of officers.
>
> No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

The plaintiff had acted with prudence and had exercised reasonable care and caution in the sale and purchase agreement with Kunjung Raya when they relied on the information gathered from the land search made at the defendant's office

[25] In this present appeal, the purchase price of the property was RM5,554,177.50. From the facts of the case, it was clear that the plaintiff had chosen to rely only on the private land search conducted vide their solicitors to enter into the sale and purchase agreement with Kunjung Raya for the purchase of the property. The plaintiff then paid a deposit of RM555,418.75 by way of banker's cheques.

[26] The plaintiff contended that they had acted with prudence when they

A conducted the land search prior to entering into the sale and purchase agreement.

B **[27]** We, however, agreed with the finding of the learned JC that the plaintiff had in fact not acted with prudence and had not exercised reasonable care and caution with regards to this land transaction. We agreed that the plaintiff had been hasty in proceeding with this transaction as records showed that all the transaction was done within a period of a month.

C **[28]** There was no evidence to suggest that the plaintiff had made any attempt to prevent their banker's cheques from being cashed out once the plaintiff failed to lodge a private caveat over the property. The plaintiff should have exercised their due diligence carefully and taken necessary proactive measures to prevent and/or mitigate their losses when they failed to lodge the said caveat a week after the signing of the agreement.

D **[29]** The fact that the plaintiff had failed to lodge the private caveat should have been perceived as a red flag that something was amiss and yet there was no evidence of any immediate action taken by the plaintiff to stop this transaction.

E **[30]** In light of the above, we had no reason to disagree with the learned JC's finding that the plaintiff had not acted with prudence and had not exercised reasonable care and caution by entering into this transaction merely on the information received from a private search. We further noted that two banker's

F cheques for the amounts of RM144,335.75 and RM300,000 (P15) were dated 20 June 2007, that is, a date before even the sale and purchase agreement was executed on 22 June 2007.

G **[31]** In any event, this issue was not material to the appeal seeing that the appeal turned on the issue of private land search under s 384 as against the official search under s 385 of the NLC.

CONCLUSION

H **[32]** As such, it was our unanimous decision that this appeal be dismissed with costs of RM10,000 and the deposit to account of costs.

Order accordingly.

I Reported by Afiq Mohamad Noor